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No. 88–1597

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

THE BOARD OF EDUCATION OF THE WESTSIDE COMMUNITY SCHOOLS (DIST. 66), et al.,
Petitioners

v.

BRIDGET C. MERGENS, et al.,
Respondents

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF OF AMICUS CURIAE IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICUS CURIAE IN SUPPORT OF RESPONDENTS*

As a law professor with children of my own in the Nebraska public schools system, I am concerned with preserving fundamental freedoms secured by the First Amendment as applied in the public schools. I have published in support of First Amendment issues in the past and feel compelled in this case because of the magnitude of the issues involved and the short shrift often given to free exercise over establishment concerns to argue in support of a more compassionate resolution of the issues herein involved.

* Counsel of record to all parties in this case have consented to the filing of this brief and letters of consent have been filed with the Clerk pursuant to Rule 36.

SUMMARY OF ARGUMENT

Westside High School has deprived Bridget Mergens and her fellow members of the proposed Bible Study Fellowship Club of fundamental rights to free speech, free association, free exercise, equal protection, as well as the protection of the *Equal Access Act*. Westside officials in their brief rely on a "closed forum" characterization of the school's extracurricular activities in their effort to avoid recognition of the students' free speech rights and application of the *Equal Access Act*. The students in their brief on the merits have persuasively refuted Westside's forum characterization arguments. The proper resolution of this case, then, turns on the adequacy of the argument reconciling the First Amendment rights of the students with the establishment concerns that are really at the heart of the matter. This amicus curiae brief addresses the establishment issue in light of the other First Amendment rights implicated by the discriminatory exclusion of religious extracurricular activities from the public schools.

Briefly, no well-reasoned establishment argument justifies Westside's discriminatory treatment of the students' Bible Study and Fellowship Club. From a neutral principelist perspective, *Widmar v. Vincent*, 454 U.S. 263 (1971), is on point and controlling. The school's announced mission of "total education" of their students including development of "wholesome attitudes" and "good human relations" match the purposes of the Bible Study and Fellowship Club. Moreover, a curriculum nexus exists between bible study and related curriculum areas. Further, unrebutted trial testimony, supported by the legislative history of the *Equal Access Act* and common experience establishes that secondary school students are capable of distinguishing neutral treatment from endorsement of relig-

oriented extracurricular clubs. Any other conclusion would be untenable in any event, because students would also be incapable of distinguishing discriminatory exclusion from hostile disapproval.

From an accommodationist perspective, toleration of the Bible Club would alleviate significant governmental interference with the ability of religious students to define and carry out their religious views, rights protected by free exercise and free association, without sliding over into the preferential treatment the Establishment Clause historically was meant to exclude.

From a separationist perspective, equal recognition of religious extracurricular activities as per *Widmar* serves the secular purpose of encouraging student development and the free expression of ideas, has the secular effect of reinforcing diversity and state neutrality toward value orientation, and diminishes entanglement problems by decreasing the need for monitoring student groups lest religious ideas be smuggled in under other pretenses.

From a reconciliationist perspective, the balanced recognition of the students' free speech, free association, free exercise and equal protection rights avoids the establishment of the civil religion of Secular Humanism which jealously seeks protection from any competing belief systems that is not informed by epistemic rationality and science. Reconciliationism would require compassionate toleration of students whose compulsory attendance at public schools threaten their religious orientation.

Because establishment principles can be reconciled from any number of interpretivist paradigms with the First Amendment rights of the students, Westside's discriminatory exclusion of the Bible Study and Fellowship Club cannot be justified.

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ARGUMENT

PERMITTING EXTRACURRICULAR RELIGIOUS ACTIVITIES IN THE PUBLIC SCHOOLS RESPECTS THE FREE SPEECH, FREE EXERCISE, FREE ASSOCIATION AND EQUAL PROTECTION RIGHTS OF THE STUDENTS INVOLVED WITHOUT VIOLATING ESTABLISHMENT PRINCIPLES.

This important First Amendment case squarely presents the issue of whether the discriminatory treatment of religious speech and activities in an extracurricular setting in public schools can be justified by reliance on Establishment Clause principles.

The reconciliation of First Amendment rights with establishment concerns is one of the most difficult issues facing the Court today. In addressing this complex problem jurists and commentators have recommended various paradigms for understanding and resolving church and state conundrums. Usually the explanatory models focus on establishment concerns without giving free speech, free association, free exercise and equal protection rights adequate consideration. Consequently, the selected paradigms may obscure the complex interrelationship between the rights involved rather than enlighten; the paradigms on the other hand, may facilitate the rational resolution of an otherwise irresolvable conflict of legal principles. Of course no consensus view exists as to the appropriate paradigm that would capture the essence of church and state relations. Models are proposed, relied upon and discarded as their explanatory powers diminish under different factually settings. The dominant paradigms include neutral principelism, accommodationism, strict separationism, and reconciliationism. While controversy remains as to the cogency of the variant explanatory models, an examination of each applied to the facts of this case supports the Eighth Circuit's decision requiring that Westside High School provide equal access to the students' Bible Study and Fellowship Club. This brief is limited to a review of the competing church and state paradigms and their application to the facts of this case.

A. *NEUTRAL PRINCIPLEISM FAVORS THE EQUAL TREATMENT OF RELIGIOUS EXTRACURRICULAR CLUBS.*

The liberal principle of neutrality, a concept embodied in the time honored notion of equal protection, mandates that public benefits neither be granted nor withheld on the basis of race, creed or religion. In effect the neutrality principle invalidates all forms of unjustified state discrimination.

The facts of this case closely track those at issue in *Widmar v. Vincent*, 454 U.S. 263 (1981), a case that can be understood as an affirmation of the neutrality paradigm. Whether characterized as strictly a free speech case requiring content-neutral regulation of free speech or a free exercise case requiring neutrality toward religion, *Widmar* mandates, on First Amendment principles apart from public policy consideration supporting the *Equal Access Act*, that extracurricular religious activities be given neutral treatment in the context of education conducted under state auspices.

The pivotal issue in the case at bar is whether Westside officials, notwithstanding the First Amendment rights found implicated in *Widmar*, may discriminate against the students' Bible Study and Fellowship Club. Westside seeks to distinguish the otherwise controlling *Widmar* on two grounds: differences in forum characterization and the enhanced impressionability of secondary, as compared with university students. A neutral principles analysis would reject both distinctions. Discrimination based on the religious content of the extracurricular activity violates free speech, equal protection and free exercise whether the discrimination occurs at the university or the secondary school level; neutral accommodation of such activities, in comparison, does not violate establishment principles. The forum characterization and enhanced impressionability arguments

simply cannot justify the blatant discrimination involved in this case.

1. *Defects of The Curriculum-Related Argument*

In essence Petitioners argue that school administrators may discriminate against Respondent's Bible Study and Fellowship Club because public schools are nonpublic forums within which the administrators wield substantial discretionary authority. Petitioners argue that their discretionary authority follows from the fact that Westside High School, unlike a university, is a nonpublic forum because all of its activities, including extra-curricular programs, meet curriculum-related tests.

However, the curriculum-related claim neither captures the announced policies justifying extracurricular clubs, explains the admissions of Westside's administrators, nor reflects the actual state of affairs. School Board policy 5610 justifies a wide spectrum (beyond narrow curriculum contexts) for student clubs because such clubs serve as a "vital part of the total education program as a means of developing citizenship, wholesome attitudes, good human relations, knowledge and skills." (Joint Appendix 488 [hereinafter J.A.]).

If the clubs were limited to expanding knowledge and skills development, then a curriculum nexus would at least correspond to the justificatory policy statement. Where the policy encompasses concepts of "total education" including views of "wholesome attitudes" and "good human relations," then the educational objectives have been broadened to include matters not covered by the curriculum directly. Indeed, the extra-curricular clubs might be best justified for their relation to the "total education" of the students beyond narrow curricular matters. Accordingly, it would be irrational to exclude for "beyond the scope of educational objectives" reasons the students' Bible Study and Fellowship Club which identifies these "total education" objectives as constituitive of its purposes as well. (J.A. 73-77, 154-155, 185, 190). Indeed, the reference to "Fellowship" in the name of the club itself reflects the organizer's intent that the members would meet, in part, to "talk about things that are going on in our lives and how we can help each other and give advice and give encouragement to one another." (J.A. 75). How could any rational review of the club's purposes deny their compatibility with the published School Board Policy 5610? It is not surprising then that under cross examination at trial Dr. Findley admitted that the objectives of the Bible and Fellowship club were supportive of the noncurricular goals and missions of the school in providing total education by promoting good citizenship, wholesome attitudes and good human relations. (J.A. 234).

This view expanding the scope of acceptable clubs beyond a curriculum nexus to include activities conducive to wholesome attitudes and good human relations explains why Dr. Findley, principal of Westside High School, expressly admitted at trial that at least one club "Peer Advocates," a service activity club allowing students to work with handicapped students, was recognized despite the absence of any nexus with the existing curriculum (J.A. 231). Providing services to the handicapped stimulates wholesome attitudes and develops good human relations.

Even without an expanded view of the mission of total education, the evaluative nature of the curriculum-related characterization, if afforded discretionary deference, would permit unfettered discrimination under the pretext or guise of bright-line curriculum tests. The Eighth Circuit recognized that deferring to the administrator's pretext of relying on a "curriculum-related" test would permit officials to circumvent the constitutional principle of equal access and the express policy underlying the *Equal Access Act* by administrative decree while

allowing them to arbitrarily deny unfavored student speech. (*Mergens v. The Board of Education of the Westside Community Schools*, 867 F.2d 1076, 1079 (8th Cir. 1989)).

The facts of the instant case in this regard make it clear that the students' Club was excluded not because of any lack of nexus to the educational objectives of Westside, but rather because of discriminatory purposes. If Westside administrators easily found a curriculum-related nexus between the Chess Club (math), the Subsurfer Club (physical education), and the service clubs Interact and Zonta (sociology), then why could they not see a connection between bible study and fellowshipping and the educational missions of teaching literature, poetry, sociology, history, moral philosophy and related curricular objectives?[1]

It is obvious that the Westside administrators did not exclude Respondent's Bible Study and Fellowship Club because of all the thirty other clubs, (J.A. 479), which applied for and were recognized by school officials it was the only group which neither developed wholesome attitudes and good human relations nor could be justified as having a curriculum-related nexus. Rather,

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[1] The Court in *Abington School Dist. v. Schempp*, 374 U.S. 203, 225 (1963) stated "It certainly may be said that Bible is worthy of study for its literary and historical qualities." 374 U.S. at 225. The Third Circuit in *Bender v. Williamsport Area School Dist.*, 741 F.2d 538, 549.18 (3d. 1984), vacated on other grounds, 106 S.Ct. 1326 (1986) discounting a similar curriculum related justification for discriminating against religious activities during free activity periods stated:

> While it might be said that each of these activities enhances the curricular goals of the school by promoting civic awareness (the Key Club, logical thought (the Chess Club), practical applications of scientific principles (Aviation club), or a general sense of responsibility (Office Aides), the same extended chain of reasoning could be used to justify religion as a promoter of civic, social, and intellectual values.

the group was discriminated against because of its speech content: religion. If so, the discriminatory treatment would not even satisfy the *Cornelius* requirements for nonpublic forums that they be " 'reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view.' " (*Cornelius v. NAACP Legal Defense & Education Fund*, 473 U.S. 788, 800 (1985) (quoting *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983)). The closed-forum expanded discretionary-authority argument urged in distinguishing *Widmar's* neutral principelism is simply a nonpersuasive ruse calculated to obscure under the pretext of administrative discretion Westside's discriminatory treatment of the Bible Study and Fellowship Club.

Westside administrators discriminated against the students' Bible Study and Fellowship Club solely because of their misunderstanding of the requirements of the establishment clause: they concluded that notwithstanding the compatibility of the Bible Study and Fellowship Club with the total education and curricular objectives of the school and contrary to *Widmar*, that permitting a religious group to meet with school approval would be an encroachment upon their perception of constitutional requirements demarcating the wall of separation between church and state. (J.A. 312). However, "[t]he Establishment Clause does not license government to treat religion and those who teach or practice it, simply by virtue of their status as such, as subversive of American ideals and therefore subject to unique disabilities." (*McDaniel v. Paty*, 435 U.S. 618, 641 (1978) (Brennan, J., concurring)). Stated differently, "it is common ground that nothing in the Establishment Clause requires the State to suppress a person's speech merely because the *content* of the speech is religious in character." (*Bender v. Williamsport Area School Dist.*, 106 S.Ct. 1326, 1337 (Burger, C.J., dissenting)). Justices Rehnquist and White joined in the dissent.

Moreover, we have been warned against constitutionalizing the wall of separation metaphor, a figure of speech, that easily captures the imaginations of administrators but inadequately describes the complexity of church and state relations.[2] Neutral principelism cannot abide the curriculum related ruse used to cover the blatant discrimination involved in this case. If the exclusion is to be justified, it must be establishment principles not pretexts of a curriculum-related distinction. Neutral principelism would hold equal access compatible with establishment principles and supportive of First Amendment rights.

2. *The Errors Inherent in the Endorsement Issue*

The second reason given by the Petitioners for discriminating against the students' Bible Study and Fellowship Club, notwithstanding consistency with educational objectives and the clear authority of *Widmar* to the contrary, focuses on the supposed enhanced impressionability of secondary school students. That is, the Establishment Clause requires that the state neither prefer nor discriminate on the basis of religious content. If the school recognized religious groups on par with other student groups then some impressionable secondary school students might mistakenly infer state support of religion contrary to the requirements of the Establishment Clause.

Westside's empirical assumption of implied endorsement is wrong factually and is self defeating conceptually. Judge Beam in his trial court's opinion credited the unrebutted testimony of Dr. David Moshman, qualified as an expert in the develop-

[2] Justice Reed, in dissent in *Illinois ex rel. McCollum v. Board of Education*, 333 U.S. 203, 247 (1948), the year following *Everson's* first invocation of the wall metaphor as an explanatory paradigm of church and state relations, in response to his perception that the wall metaphor was obscuring analysis, stated that "[a] rule of law should not be drawn from a figure of speech."

ment of cognitive reasoning and intellectual development, to the effect that "students over the age of 12 years can make sponsorship distinctions and that there is no significant differences between high school and college students in their abilities to understand endorsement or nonendorsement by the school." (*Mergens v. The Board of Education of the Westside Community Schools*, No. Cv 85-0-426, slip op. at 11, n.1 (1988) (Reproduced in Petition for a Writ of Certiorari: Appendix B)). Student testimony corroborated Dr. Moshman's opinion that students can distinguish school sponsorship from neutral recognition of a bible club. (J.A. 211-212, 214-15).

The unrebutted testimony that secondary school students are cognitively indistinguishable from university students with respect to their ability to make sponsorship distinctions finds support in the literature and is consistent with congressional findings connected with the passage of the *Equal Access Act*. The available studies indicate that adolescents resist authority and are capable of independent critical thought. (Laycock, "Equal Access and Moments of Silence: The Equal Status of Religious Speech by Private Speakers," 81 *Nw U.L.Rev.* 1, 16 (1986); Note "The Constitutional Dimensions of Sudent Initiated Religious Activity in Public High Schools," 92 *Yale L. J.* 499, 507-09 (1983); Strossen, "A Framework For Evaluating Equal Access Claims by Student Religious Groups: Is There a Window for Free Speech in the Wall Separating Church and State?," 71 *Cornell L. Rev.* 143, 162 (1985)). The Senatorial Committee considering extending *Widmar* to the secondary school level via the *Equal Access Act* observed that "[a]uthors writing in leading periodicals have considered the issue and agree that students below the college age can understand that an equal access policy is one of State neutrality toward religion; not one of State favoritism." (S. Rep. No. 357, 98th Cong., 2d Sess. 8 (1984)). The Eighth Circuit accepted "Congress' fact-finding" on this issue. In this regard it is well established that "[t]o the extent 'legislative fact' are [sic]

relevant to a judicial determination, Congress is well equipped to investigate them, and such determinations are of course entitled to respect." (*Katzenbach v. Morgan*, 384 U.S. 641, 668 (Harlan, J., dissenting)).

Apart from the fact finding regarding the apparent endorsement issue, if students cannot understand the neutral treatment afforded religion by an equal access policy, how can they be expected not to infer hostility toward religion if only religious extracurricular activities are excluded from the school? If they cannot distinguish neutral treatment from endorsement, how can they distinguish discriminatory treatment from hostility? Moreover, why should the entire burden of mistaken endorsement versus hostility to the bible study group be placed on the shoulder of the students? Why not allocate a heavy burden of persuasion to the state when First Amendment rights are being jeopardized because of the possibility of mistaken views regarding endorsement arising out of neutral treatment? For an extensive overview of the problems of burdens of proof in the free exercise context, (see Lupu, "Where Rights Begin: The Problem of Burdens on the Free Exercise of Religion," 102 *Harv. L. Rev.* 933 (1989)). In this regard the Court should respect the time honored cliche: "The remedy for bad speech is more speech." (*Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring)).

To this end the students urged the school, if necessary to avoid the impression of impermissible sponsorship, to make announcements in the school paper or the public address system to the effect that the school did not endorse or in any way sponsor the Bible Study and Fellowship Club. (J.A. 73). Similarly, Respondents preferred dispensing with the common appointment of a "faculty sponsor" who would perform sporadic custodial monitoring lest others falsely infer school endorsement because of the occasional attendance of a faculty

sponsor. (J.A. 92, 111-12, 123-24, 247). Accordingly, Westside's argument that Respondents are in reality seeking school endorsement of their Club and its religious tenets is nonsensical. Rather, what the students seek is a student initiated and conducted extracurricular activity devoid of any school sponsorship other than neutral permission to meet. Accordingly, notwithstanding the religious content of their speech,[3] the students are protected by the constitutional principle recognized in *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 506 (1969), and reaffirmed in *Bethel School District No. 403 v. Fraser*, 478 U.S. 675 (1986), to the effect that students do not "shed their constitutional rights to freedom of speech or expression at the school house gate."

In summary, application of the neutral-principles paradigm for interpreting church and state issues would require that the students' Bible Study and Fellowship Club be afforded equal access. This conclusion is compatible with the *Equal Access Act*, as well as the constitutional principles of free speech, free association, free exercise and equal protection. The discriminatory treatment of the students' Bible Study and Fellowship Club can neither be justified on a pretest of a curriculum-related distinction, or on the pretense of implied endorsement. Neutral principleism requires equal access in line with *Widmar* and provides an analytical explanation why establishment principles are not adversely implicated.

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[3]Professor Lawrence Tribe made the point in congressional hearings considering the constitutionality of religious speech in the public school setting that "[n]o conceivable principle of distinction can suggest that students who have a right to wear arm bands to protest the war suddenly lose that right if they utter the name of God in the process, or if, heaven forbid, they should do it as a group instead of single file." Religious Speech Protection Act: Hearing on H.R. 4996 before the Subcommittee on Elementary, Secondary, and Vocational Education of the House Committee on Education and Labor, 98th Cong., 2nd Sess. 47 (1984).

B. *ACCOMMODATIONISM RECOMMENDS TOLERANCE OF RELIGIOUS EXTRACURRICULAR CLUBS AS A NON-PREFERENTIAL MEANS OF AVOIDING INTERFERENCE WITH THE RELIGIOUS NEEDS OF STUDENTS.*

Accommodationism is an interpretivist paradigm invoked in the First Amendment arena as an alternative to the strict separationism suggested by the wall metaphor. The paradigm willingly acknowledges the historical reality and the normative acceptability of the fact that "[o]ur system at the federal and state levels is presently honeycombed" with governmental support of religion. (*Engle v. Vitale*, 370 U.S. 421, 437 (1962) (Douglas, J., concurring)). The accommodationist paradigm has been variously justified on the basis of "original intent" analysis, (Justice Rehnquist recommended the replacement of *Lemon* with an "original intent accommodationist" scheme in *Wallace v. Jaffree*, 472 U.S. 38, 113 (Rehnquist, J., dissenting)), as a practical way of ameliorating the latent "dangers" of governmental hostility toward religion thus preserving free exercise, (*Walz v. Tax Commission of New York City*, 397 U.S. 664, 673 (1970)), and as keeping with the political theory of pluralism historically and presently underlying the Constitution. McConnell, "Accommodation of Religion," 1985 *Supreme Ct. Rev.* 1, 17.

The accommodationist question presented in this case is whether permitting non-discriminatory treatment of religious extracurricular activities can be justified in the same way the First Amendment permits legislative prayer, (*Marsh v. Chambers*, 463 U.S. 783 (1983)), released-time programs for religious training away from school premises, (*Zorach v. Clauson*, 343 U.S. 306 (1952)), religious exemptions from the (*Civil Rights Act of 1964, Corporation of Presiding Bishop v. Amos*, 107 S.Ct. 2862 (1987)), or the preferred protection of religion that the

Free Exercise Clause itself entails. In short, is equal access part of the traditional honeycomb indicative of Framer's intent which is normatively worth preserving?

The "original intent" argument supporting accommodationism relies heavily on historical examples rebutting the historicity of strict separationism. (*See*, R. Cord, *Separation of Church and State* (1982); M. Malbin, *Religion and Politics, The Intentions of the Authors of the First Amendment* (1978); Corwin, "The Supreme Court as National School Board," 14 *Law & Contemp. Prob.* (1949)).

The public policy or expediency argument justifies an accommodationist approach in circumstances where strict separationism would entail significant governmental interference with the possibility of persons living in accordance with the the dictates of their religious consciousness. As the Court has repeatedly recognized

> When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our tradition. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs. To hold that it may not would be to find in the Constitution that the government show a callous indifference to religious groups. That would be preferring those who believe in no religion over those who do believe.

(*Zorach v. Clauson*, 343 U.S. 306, 313-14 (1952)).

Adopting an accommodationist perspective, the Court has validated, against establishment challenges and in keeping with free exercise rights, religious exemptions from specific state duties, such as military draft laws, (*United States v. Seeger*, 380

U.S. 163 (1965). *Welsh v. United States*, 398 U.S. 333 (1970)), or antidiscrimination provisions of civil rights legislation. (*Corporation of Presiding Bishop v. Amos*, 107 S.Ct. 2862 (1987)). The Court in such cases has held that Accommodationism constitutionally alleviates "significant governmental interference with the ability of religious organizations to define and carry out their religious missions." (*Corporation of Presiding Bishop v. Amos*, 107 S.Ct. 2862, 2870 (1987)). As Justice Scalia, dissenting in *Texas Monthly Inc. v. Bullock*, observed, "[i]t is not always easy to determine when accommodation slides over into promotion, and neutrality into favoritism," (109 S.Ct. 890, 913 (1989)), but the principle remains nonetheless: where strict separationism would likely interfere with the ability of religious adherents to carry out their religious responsibilities then the state "may (and sometimes must) accommodate religious practices and that it may do so without violating the Establishment Clause." (*Hobbie v. Unemployment Appeals Commission*, 480 U.S. 136, 144-45 (1987) (Scalia, J., dissenting)).

Accommodationists have also argued that the historical political theory that underlies the Constitution is more consistent with an accommodationist than a separationist position. (McConnell, "Accommodationism of Religion," 1985 *Supreme Ct. Rev.* 1, 14-23). The argument essentially has three parts explaining the political theory of the Framers specifically and contemporary liberal theory generally. First, morality essential to public order is problematic within the liberal state because the state cannot justifiably be the source of ultimate values, but instead is limited to providing a regime of fair procedures for mediating self interest. In brief, there is a social need for public virtue but no legitimate way for the state to shape public morality. Second, the genius of pluralism is that private associations outside of government provide the principal means by which civic responsibility is developed and the possibility of public order made possible. These associations, including

families, churches, and other organic groups, "bear the brunt of the responsibility for articulating and inculcating values of morality and justice in the liberal republic." *Id.* at 17. Third, Madison's theory of factionalism[4] essential to the political theory underlying the Constitution explains how the liberal state benefits from the civic virtue flowing from private organizations, without suffering the dangers of religious tyranny that would result if the state compelled a unitary religious or moral perspective:

> Liberal political theory thus favored religion, but it did not favor any one religion. It guaranteed religious freedom in the hope and expectation that religious observance would flourish, and with it morality and self-restraint among the people. But it feared monopoly in religion, especially at the national level.

(McConnell, *supra* at 19-20).

Finally, there exists valid policy reasons for accommodating religion apart from any intent of the framers argument. That is, accommodationism "constitutes a reasonable and balanced attempt to guard against" the "latent dangers" of government hostility toward religion. (*Walz v. Tax Commission of New York City*, 397 U.S. 664, 673 (1970)). Unswerving adherence to strict separationism, rather than balanced accommodationism, would trivialize and unnecessarily privitize the religious experience of many devoted and patriotic citizens. Accommodating their religious sensitivities, without endorsing their belief system as that of the state's, would compassionately respect their twin allegiances to god and country.

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[4] Madison, in Federalist No. 51, expressly relied on the favorable circumstances for religious freedom that the multiplicity of religious sects had presented in colonial America as the exemplar for his recommending analogous factionalism in politics.

Supreme Court justices have, in many instances, adopted the accommodationist rationale as an alternative to strict separationism. Justice White, in dissent in *Lemon v. Kurtzman*, articulated an accommodationist approach as an acceptable alternative to a strict separationist solution:

> The Free Exercise Clause of the First Amendment at least permits government in some respects to modify and mold its secular programs out of express concern for free-exercise values.... "[W]hen the state encourages religious instruction ... it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs."

(403 U.S. 602, 664-65 (White, J., dissenting) (quoting *Zorach v. Clauson*, 343 U.S. 306, 313-14 (1952)).

Again in *Corporation of Presiding Bishop v. Amos*, Justice White writing for the Court, in upholding a section of the Civil Rights Act of 1964 exempting religious groups from Title VII's antidiscrimination provisions, held that it is a permissible legislative purpose to alleviate "significant governmental interference with the ability of religious organizations to define and carry out their religious missions." (107 S.Ct. 2862, 2870 (1987)). To the same effect, Justice Scalia, in dissent in *Hobbie v. Unemployment Appeals Commission*, observed that "the government may (and sometimes must) accommodate religious practices and that it may do so without violating the Establishment Clause." (480 U.S. 136, 144-45 (1987)).

Applied to the facts of the instant case, there are sound bases for accommodating religious extracurricular activities. Bible study and fellowshipping are a vital part of the daily lives of the students involved. (J.A. 75, 131, 163). Rather than a

private religion which can be fully realized by personal prayer in a closet far from the public eye, these students identify their very self worth by their willingness to share their religious views and fellowship. When they were denied the right to gather together for purposes of religious discussion and fellowship at the high school where they spent much of their day with many of their friends and associates, (J.A. 431-43, 451-454), they were put in the impossible position of choosing between adhering to their religious conscience or respecting the orders of the school administrators. Rather than "sneaking around behind the administration's back", (J.A. 113), and secretly meeting for religious fellowship and study during free time or before or after school, the students curtailed their rights of free speech, (*Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 506 (1969), *Widmar v. Vincent*, 454 U.S. 263, 269 (1981)), free exercise,[5] and free association[6] and petitioned the courts for constitutional relief.

Surely the concept of accommodation fits squarely when personal rights are so manifestly implicated. Clearly then the Court would follow the best of our tradition by respecting the religious nature of many students who are subject to compulsory school laws but retain a view of a life well lived which

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[5] The school, by excluding use of the school facilities for religious extracurricular activities when they are made available for other activities, has denied a public "benefit" because of conduct mandated by religious belief, contrary to *Thomas v. Review Board of Indiana Employment Security Division*, 450 U.S. 707, 717-718 (1981),

[6] The Court observed in *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958) that "[while the freedom of association is not explicitly set out in the Amendment, it has long been held to be implicit in the freedoms of speech, assembly, and petition." More recently, the Court in *Healy v. James*, 408 U.S. 169, 180 (1972), recognized that "[a]mong the rights protected by the First Amendment is the right of individuals to associate to further their personal beliefs."

intertwines religious with secular affairs. By accommodating the needs of students who view religion as a way of life rather than simply a contemplative experience that can be done privately in purely religious forums the state would throw off the callous indifference to religion an exclusionary policy would necessarily entail. In doing so the state would neither violate the original intent of the Framers regarding establishment, the political theory of pluralism which historically and normatively justifies establishment principles, nor perpetuate the latent dangers of governmental hostility toward religion.

C. *SEPARATIONISM IS NOT JEOPARDIZED WHERE EQUAL TREATMENT OF RELIGIOUS CLUBS SERVES SECULAR PURPOSES, HAS SECULAR EFFECTS AND DOES NOT ENTAIL ENTANGLEMENT.*

Separationism, as an interpretivist model, has substantially influenced the way church and state problems are perceived, especially by nonlawyers. Indeed the Westside school administrators in this case have justified their discriminatory treatment of the students' Bible Study and Fellowship Group on strict wall of separation reasoning. (J.A. 341, 345-46). The complexity of church and state relationships, however, cannot so easily be disposed.

The wall metaphor does not even explain the case, *Everson v. Board of Education*, 330 U.S. 1, 16 (1947), which proposed it as the proper historical interpretation of the Framer's intent. For even as Justice Black explained that no tax in any amount could be used to support religious activities, the Court permitted, against establishment challenges, tax money to be used to reimburse parents for the cost of transporting their children to parochial schools: so much for the strict wall of separation. The religious needs of parents and children were accomodated as compatible with the secular purposes of education generally. The wall metaphor, if taken literally, would simply leave out of the analysis special considerations which public policy and free speech, free exercise, free association and equal protection principles require. A wall cannot constitutionally demarcate boundaries between church and state lest other personal rights be subordinated to a figure of speech.

Strict separationists since *Everson* have developed a three-part test, first announced in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), as a canonical guide for analyzing establishment issues: the wall of separation is not violated if the incursion has a secular purpose, a secular effect and does not entail excessive entanglement. In brief, the permeable boundary between church and state must rationally accommodate competing rights and public interest analyses.

The Eighth Circuit applying a strict separationism analysis in this case held, (*Mergens v. The Board of Education of the Westside Community Schools*, 867 F.2d 1076, 1080 (8th Cir. 1989)), on the authority of *Widmar v. Vincent*, 454 U.S. 263 (1981), that an equal access policy does not violate *Lemon* and is required as a matter of constitutional principles apart from the applicability of the *Equal Access Act*. The Court in *Widmar* observed that an equal access policy has a secular purpose of encouraging student development and the free expression of ideas. Similarly the Court noted that any discriminatory policy would require increased monitoring of student groups lest religious ideas be smuggled in under other pretenses. Thus a restrictive policy would entail enhanced rather than diminished entanglement.

Widmar's holding that an equal access policy does not violate strict separationism is binding here unless it can be affirmatively shown that a nondiscriminatory policy at a secondary school level would have the *effect* of advancing religion due to the false impression of students who infer that the school is

endorsing the religious group. However, the empirical and conceptual error associated with the empirical endorsement argument has been rebutted previously in this brief in connection with the discussion of the neutral principles paradigm. Suffice it to say that the unrebutted testimony at trial, the congressional fact-finding supporting the *Equal Access Act*, the available sociological studies of the cognitive abilities of secondary students, and common sense all suggest that high school students are capable of understanding that an equal access policy reflects constitutionally required neutrality toward religion rather than sponsorship. Moreover, any other conclusion would raise the converse dilemma of the implied hostility a discriminatory policy would entail. Accordingly, an equal access policy would not even violate the strict separationist paradigm, as the Eighth Circuit observed in this case.

D. *RECONCILIATIONISM MANDATES THE RECONCILING OF STUDENTS' RIGHTS WITH ESTABLISHMENT PRINCIPLES SUCH THAT THE CIVIL RELIGION OF SECULAR HUMANISM IS NOT GIVEN AS A JUSTIFICATION FOR EXCLUDING RELIGIOUS EXTRACURRICULAR ACTIVITIES.*

Reconciliationism represents a principled alternative to strict separationism. The model, in embryonic stages of recognition, has received receptivity from justices disenchanted with the exclusivity, questionable historicity, impracticality and unacceptable normative implications of *Lemon's* strict separationism. For example, the court in *Lynch v. Donnelly*, 465 U.S. 668 (1984), in questioning the controlling effect of *Lemon's* tripart test, observed that "we have repeatedly emphasized our unwillingness to be confined to any single test or criterion in this sensitive area." (*Id.* at 679). More specifically, Justice Scalia, dissenting in *Texas Monthly, Inc. v. Bullock*, 109 S.Ct. 890, 913 (1989), recommended more of a reconciliationist model in explaining that "*Lemon* is not, after all, a statutory enactment."

Reconciliationism can initially be described in contrast to the other interpretivist models. First, it rejects strict separationism as giving undue weight to establishment over other personal rights such as free speech, free exercise, free association and equal protection principles. Second, it rejects the appearance of ad-hoc balancing accommodationism sometimes is accused of and seeks to rationalize a more principled solution to church and state conflicts. Third, reconciliationism questions the efficacy of neutral principelism as a mediating principle in church and state relationships, especially in its inability to accord free exercise principles respect beyond that which is required by free speech and equal protection.

Reconciliationism, then, represents an alternative to the strict separationist's constant depreciation of the free exercise rights of effected parties. If any free exercise claim is not to be held unconstitutional out of hand as a violation of strict separationism, then the court must recognize a principled way of respecting free exercise rights without abandoning establishment concerns. Although neutral treatment will go a long ways toward minimizing the adverse effect of discriminatory exclusion of religion from public affairs, in some instances it will not be enough. Religion in certain cases should be given a preferred status justified on free exercise reasoning. In the words of Justice Scalia, protecting free exercise even if it means giving religious activities a preferred status may in certain instances be viewed as legitimate "secular purpose and effect." (*Wallace v. Jaffree*, 109 S. Ct. 890, 913 (1989) (Scalia, J., dissenting)).

Applied to the issues in this case the focus of the discussion by the parties has been whether impressionable students are likely to infer endorsement from an equal access policy; free exercise and privacy rights implicated by a discriminatory policy are largely overlooked or, if discussed at all, they are attached to a free speech argument. Preoccupation with

the issue of "secular effect" stemming from *Lemon* creates a blind spot for the free exercise and privacy rights of school children and their families who are subject to compulsory school laws but retain nonetheless their fundamental rights to religious and moral autonomy. That is, the Court has long recognized that in our liberal society the state has no jurisdictional competence over the formulation of the ultimate values and morality of the children educated under state auspices. Rather, it is within the family that children are expected to receive their earliest identity, their sense of self worth, their most intimate set of values, beliefs and aspirations. The basic rights of the family to moral and religious autonomy enjoys constitutional priority in the public school setting over the "desire of the legislature [state] to foster a homogeneous people with American ideals prepared readily to understand current discussions of civic matters." (*Meyer v. Nebraska*, 262 U.S. 390, 402 (1923)).

Under the facts of this case, fellowship, bible reading, worship and prayer are a vital part of the daily lives of the students who initiated the Bible Study and Fellowship Club. (J.A. 75, 131, 163). These activities constitute part of their view of a life well lived. School policy justifying extracurricular clubs generally, explain that student clubs are a "vital part of the total education program as a means of developing citizenship, wholesome attitudes, good human relations, knowledge and skills." (Westside School Board Policy 5610, reproduced in J.A. 488). Similarly, school policy encourages diversity in the approach of the clubs in recognition that the"primary liberties in a student's life involve the process of inquiry and learning, of acquiring and imparting knowledge, and of exchanging ideas." (Westside School Policy 5450, reproduced in J.A. 489). Moreover, Dr. Findley admitted at the trial that Bible study and fellowship would likely "develop good citizenship," "develop wholesome attitudes," "good human relations," and "knowledge and skills." (J.A. 234). By excluding the dissemination of

any religious ideas or activities in voluntary club activities, Westside has discriminated against the free speech, free exercise, and free association rights of the students who have their own ideas as to wholesome attitudes, good human relations and the processes of inquiry, learning and exchange of ideas, as discussed previously in the neutral principles and accommodationist models.

The argument justifying discriminatory exclusion of voluntary extracurricular religious activities relies heavily on the postulated responsibility of the public schools to inculcate homogeneous "wholesome attitudes" rather than opening up the exchange of ideas to include any religious perspective. The Second Circuit Court of Appeals adopted the view that public schools should inculcate public virtue in justification of the discriminatory treatment of religious activities received in *Brandon v. Board of Education*, 635 F.2d 971, 978 (2d Cir. 1980):

> Our nation's elementary and secondary schools play a unique role in transmitting basic and fundamental values to our youth. To an impressionable student, even the mere appearance of secular involvement in religious activities might indicate that the state has placed its imprimatur on a particular religious creed. This symbolic inference is too dangerous to permit. (*Id.* at 978).

This notion that the public schools have a special responsibility to preach public values, which is jeopardized by religious extracurricular activities, is at odds with *Meyer* and prompts several questions. First, from whence come the special role of the public schools in value inculcation? Second, what are these values? Third, how is the exclusivity of these values justified against establishment challenges? Fourth, what happened to the long-recognized right of the family and the individual right of privacy which precludes state intervention into the domain

of value development? Fifth, if the state, through its schools decides to promote a belief system that is the functional equivalent of religion, has it not established its own form of religion? Sixth, if religious ideas are peculiarly excluded by the public schools as possible value sources, have they not expressed hostility to religion and established their own version of a preferred non-religious belief system?

Some urge the adoption of a civil religion justified as serving the sociological role of traditional religions in building a sense of community and responsibility without invoking the problematic aura of sacredness. A few advocates of civil religion would even embue civil religion with sacred implications. The unanswered question remains as to why inculcating such a preferred belief system in the public schools does not constitute an impermissible establishment of religion?

In defining religion for constitutional purposes, the Court has long since abandoned a narrow theistic definition stating that "among religions in this country which do not teach what would generally be considered a belief in the existence of God are Buddhism, Taoism, Ethical Culture, Secular Humanism and others." (*Torcaso v. Watkins*, 367 U.S. 488, 495 n.11 (1961) (invalidating a Maryland oath of office requirement of a profession of belief in God)). In the conscientious objector cases the court has adopted a functional test for characterizing beliefs as religious for constitutional purposes. The test is "whether a given belief that is sincere and meaningful occupies a place in the life of its possessor parallel to that filled by the orthodox belief in God ...." (*United States v. Seeger*, 380 U.S. 163, 165-66 (1965)). Only if beliefs are insincere or do not "rest at all upon moral, ethical, or religious principle but instead rest solely upon considerations of policy, pragmatism, or expediency" (*Welsh v. United States*, 398 U.S. 333, 342-43 (1970)), should they be classified as nonreligious for purposes of First Amendment protection.

The fact that parallel belief systems premised alternatively on "moral, ethical, or religious principles" qualify as religious for First Amendment purposes poses special problems if public schools believe that they have a special mission of value inculcation which extracurricular religious activities would challenge. John Stuart Mill in his famous essay *On Liberty* warned against state-run schools inculcating *the* accepted values through state education:

> All that has been said of the importance of individuality of character, and diversity of opinions and modes of conduct, involves, as of the same unspeakable importance, diversity of education. A general [s]tate education is a mere contrivance for molding people to be exactly like one another; and as the dominant power in the government ... it establishes despotism over the mind. ... There would be nothing to hinder them from being taught religion, if their parents chose, at the same schools where they were taught other things. All attempts by the [s]tate to bias the conclusions of its citizens on disputed subjects are evil .... (J. Mill, *On Liberty* 129-31 (Library of Liberal Arts ed. 1956)).

Moreover, if public schools have a unique role in transmitting basic values to our youth, what about free exercise as a central value worthy of respect? By Westside allowing the Christian Bible study group to meet on an equal basis to other student groups and by explaining to the students that the school permits such equal treatment out of respect for free exercise, would not the school thereby further its duty of value inculcation without establishing despotism over the mind?

Ultimately the argument for permitting the state to inculcate nonreligious values in an exclusive way rests upon the

legitimacy of civil religion. Yehudah Mirsky, in this regard argues that "a self-conscious and critically reflective civil religion can play a positive role in cementing the communal symbolic life of American society." (Mirsky, "Civil Religion and the Establishment Clause," 95 *Yale L.J.* 1237, 1255 (1986)). He suggests that civil religion be adopted as a societal response to the advent of modernity and the loss of the social glue previously supplied by traditional religion:

> By developing and nurturing civil religions the members of modern societies attempt to recapture some of the lost, organic solidarity of pre-modern societies by linking political ideas and institutions, naturally shared by all, with a network of hallowed meanings. By so doing, a society can link its political ideas and institutions to its basic, heartfelt sentiments and aspirations. (*Id.* at 1250).

But while civil religion foisted upon public school children in the nonreligious values inculcated in them as part of their public education may provide social glue otherwise lacking in modernity, the exclusive perpetuation of such a parallel belief system runs counter to the principle of establishment. Is civil religion not subject to establishment prohibitions because of expediency or because we deem it to be true as a matter of constitutional morality?[7] Does not the Establishment Clause necessarily relegate the responsibility for inculcating belief systems to individuals, families, religious and other private associa-

[7] The Court in *Abington School Dist. v. Schempp*, 374 U.S. 203, 225 (1963), has long acknowledged the fact that "the state may not establish a 'religion of secularism' in the sense of affirmatively opposing thus 'preferring those who believe in no religion over those who do believe.' "

tions? Is not that the message of Madison's notion of factionalism as a practical limit to the state's authoritarianism?[8]

Some would defend the values of Secular Humanism exclusively inculcated through the public schools on the basis of their supposed neutrality. They are neutral because they satisfy the tests of epistimic rationality and scientific method. What strict separationists are unable to see is that for the religious adherent of sacred writings and spiritual insight through nonrational means, science and epistimic rationality are neither the sole source nor the best means for understanding truth. Thus lip service paid by liberals to the notion of freedom of conscience can be translated to tolerance subject to their own special conditions of epistemic rationality.

Professor Carter, considering this very problem questions:

> [W]hy is it that contemporary liberalism, which proclaims the freedom of individual conscience, values conscience less when an individual chooses to discover the world through faith rather than reason? What is it about religious belief that liberalism fears? (Carter, "Evolutionism, Creationism, and Treating Religion as a Hobby," 1987 *Duke L.J.* 977, 984-85).

Carter recommends that the state "not insist on reason as the only path to knowledge about the world," (Id. at 995), and suggests that we find "ways to take seriously the deep religious feelings that motivate so many Americans in their daily lives." (*Id.*)

[8] Madison, in Federalist No. 51, expressly relied on the favorable circumstances for religious freedom that the multiplicity of religious sects had presented in colonial America as the exemplar for his recommending analogous factionalism in politics translated to tolerance subject to their own special conditions of epistemic rationality.

Applied to the issue of equal access in this case, reconciliationism requires that the free exercise rights of the students be taken seriously. Extracurricular fora serve the secular purposes of enhancing the free flow of ideas and stimulating the moral development of those involved. An equal access policy would take seriously the deep religious feelings of many students. It would make the secular curriculum less threatening and less coercive to those compelled to attend but who may follow a different belief system than that which the public school system seeks to inculcate. That is, the availability of a forum for voluntary group prayer, fellowship and bible study would go a long ways toward taking the secular sting out of compulsory education laws without jeopardizing the state's exclusive commitment to science and epistimic rationality in the regular curriculum.

The ultimate question is whether the public education's commitment to Secular Humanism,[9] premised on science and epistimic rationality is to be given not only a preferred curricular status because of its supposed neutrality, but an exclusive and authoritarian approbation as constitutive of a life well lived for modern man. Does the Establishment Clause prohibit the establishment of all but civil religion?

Under reconciliationism, the free exercise rights of the students involved would be reconciled with establishment concerns. Rather than giving exclusive weight to the wall of separation metaphor, the rights of religious students in the public education setting would be considered. Why should students, protected in the capacity of other civil liberties as explained in

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[9]For a discussion of the phenomenon of secular humanism as part of the core curriculum of public education, with establishment implications, see Note, "The Establishment Clause, Secondary Religious Effects, and Humanistic Education," 91 *Yale L.J.* 1196 (1982).

Tinker, be required to shed their free speech, free association, free exercise and equal protection rights at the school house gate if their autonomy is exercised in favor of religious beliefs? Why should the state be allowed to inculcate the values of Secular Humanism without facing competition from other religious views in the context of voluntarily formed extracurricular groups? Why should rights of association, free speech and free exercise be curtailed because of their religious content when establishment principles well considered are not even jeopardized?

CONCLUSION

Westside's discriminatory exclusion of the students' Bible Study and Fellowship Club challenges the civil liberties of students generally and furthers no policy other than a misguided view of establishment restrictions. Although interpretivist views of establishment vary, none properly considered would justify the exclusionary treatment of religious clubs that admittedly satisfy the announced purposes of clubs generally. Westside excluded the Bible Study and Fellowship club because of its religious orientation. To uphold the discriminatory treatment would be tantamount to establishing Secular Humanism as the official creed of the state over which the public schools would serve as the primary pulpits for indoctrination and dissemination of ideas. Such a result would portend the realization of John Stuart Mill's fears that state education might be elevated as the means for establishing despotism over the minds of the youth.

For the reasons stated, the judgment of the Eighth Circuit should be affirmed, and the judgment entered for Respondents.

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